IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

A. G. NULSEN, JR., Executor of the Estate of A. G. Nulsen, Deceased,
Petitioner
(Appellee Below),

vs.

NATIONAL LEAD COMPANY,
a Corporation,
Respondent
(Appellant Below).

No. 638

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

RICHARD S. BULL,
418 Olive Street,
St. Louis, Missouri,
Counsel for Petitioner.

Of Counsel:
EMMET T. CARTER,
418 Olive Street,
St. Louis, Missouri,
ORLA M. HILL,
7903 Forsythe Boulevard,
Clayton, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statute Cited.

Textbooks Cited.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States of America, and the Associate Justices:

Your petitioner, A. G. Nulsen, Jr., executor of the estate of A. G. Nulsen, deceased, respectfully presents this his petition for the issuance of a writ of certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit, and shows to this Honorable Court the following:

I.

STATEMENT OF THE MATTER INVOLVED.

(a) Prior Proceedings and Proceedings Below.

Two prior lawsuits constitute the roots of the present controversy, which stems from them. The first of these, instituted in 1926, established a liability on the part of A. G. Nulsen to one C. P. DeLore, under a contract entered into between them in 1921. As Nulsen in that contract

had acted as agent for National Pigments and Chemical Company, he called upon both National Lead Company, respondent, and its wholly owned subsidiary, National Pigments and Chemical Company, to defend, but they refused. (The Lead Company had in the meanwhile acquired from Nulsen and his son all of the capital stock of the Pigments Company.) In the second suit, Nulsen obtained judgment against National Pigments and Chemical Company for the amount he had been obliged to pay DeLore, plus interest and expenses. Prior to that (but unknown to Nulsen) National Lead Company, causing the transfer to it of its subsidiary's assets, had assumed the obligations of the latter. After affirmance of this second judgment by the Supreme Court of Missouri (346 Mo. 1246), but before its satisfaction, National Lead Company began the present proceeding, to recover from Nulsen the amount of his judgment, the proceeds of which it attached in aid of service (Nulsen then being a nonresident of the state). The District Court, after trial and hearing without a jury, found all issues in favor of Nulsen, and awarded him judgment by way of counterclaim for the amount of the subsidiary's obligation which had been assumed. The Circuit Court of Appeals, however, in an opinion ignoring many of the facts found by the lower court, reversed outright the denial of a recovery to National Lead Company, and remanded with directions to enter judgment in its favor, and "for such other further proceedings as may be necessary to offset the judgment for the defendant and finally to terminate this litigation." Nulsen in the meanwhile had died, and his executor had been substituted as appellee.

Certain abbreviations in nomenclature will sometimes be used in what follows: By "Nulsen" will be meant petitioner's testator. Respondent will be referred to as the "Lead Company," while its subsidiary's name will be shortened to the "Pigments Company."

(b) **The Facts and Issues.**

The Lead Company's asserted cause of action against Nulsen was based, when reduced to its simplest elements, on the following facts: In the year 1923 it had purchased from Nulsen and his son, J. K. Nulsen, all of their shares of the capital stock of the Pigments Company. In the contract of purchase Nulsen and his son had guaranteed that on December 31, 1922, there were no liabilities of the Pigments Company not shown on the audit attached to said contract, and that if any liabilities of that company other than those shown on the audit should appear, then that they would assume and pay the same (R. 3).

This contract, by its terms, was made "for the benefit of the National Pigments and Chemical Company, as well as the party of the second part hereto (National Lead Company), and may be enforced by both the National Pigments and Chemical Company and the National Lead Company" (R. 42-43).

Subsequent to the consummation of this contract, Nulsen recovered his judgment against the Pigments Company in the sum of $21,182.48, which bore interest from January 5, 1938, the date of its rendition in the Circuit Court of the City of St. Louis, Missouri. This judgment was later affirmed by the Supreme Court of the State of Missouri (346 Mo. 1246).

The contention of the Lead Company and the basis of its claim was that the judgment obtained by Nulsen against the Pigments Company was an obligation which arose out of a liability not shown on the audit referred to in the contract aforesaid; that it was, therefore, a liability which Nulsen had agreed he would assume and pay, and that having refused to do so, he had breached his contract, and that the Lead Company had been damaged thereby in the amount of such judgment and interest (R. 4).

Nulsen's contentions and defenses were that under the terms of the contract mentioned he had not agreed to assume and to pay the claim which was the basis of his suit against Pigments Company (R. 23-24), and, specifically, that this was so because such claim arose out of the failure of the Pigments Company to pay to one Casper P. DeLore a matured obligation, the existence of which as a contingent liability of said company, by reason of recited facts with respect thereto, was disclosed and shown in the audit, and was recognized by the parties (R. 24-27). Nulsen also contended that the judgment obtained by him against the Pigments Company was res judicata as to the claim asserted by the Lead Company, in that the contract relied upon had been made both for its benefit and that of the Pigments Company and was enforceable by both companies, and in that by reason of various factors involved in the relationship between the companies, there was an identity of interests in said companies and privity between them, and that thereby the Lead Company was bound and estopped by the judgment obtained by Nulsen against the Pigments Company from maintaining its action and from asserting the claim constituting the basis therefor (R. 27-28).

For a counterclaim Nulsen pleaded the recovery of the judgment aforesaid against the Pigments Company, its nonpayment, and the facts that while the suit which resulted in such judgment was pending all of the property and assets of the Pigments Company were acquired by the Lead Company, which assumed the former's liabilities, among which was the liability which had been asserted by Nulsen (R. 29).

Undisputed facts explanatory of the origin and nature of this liability, and which bore on the question of its disclosure by the audit, appear from documentary evidence submitted at the trial. Such evidence included statements in the audit itself (R. 47-48), the petition in the suit of Nulsen against the Pigments Company (R. 64),

the DeLore-Nulsen agreement of July 30, 1921, filed therewith (R. 68); the answer of defendant therein (R. 75); the St. Louis Circuit Court judgment therein (R. 218), and the Missouri Supreme Court order of affirmance (R. 217) and opinion on appeal (R. 96). Such facts are recited in paragraph 2 of the District Court's findings (R. 223) as follows:

"2.

"In 1920, A. G. Nulsen and members of his family were the owners of the National Pigments and Chemical Company, a corporation, hereafter referred to as the Pigments Company. A Mr. DeLore was the owner of the J. C. Finck Mineral Milling Company and the DeLore Baryta Company, hereinafter referred to collectively as the DeLore Properties. Nulsen, acting for the Pigments Company, purchased the DeLore Properties from DeLore. The DeLore Properties were merged with and became a part of the Pigments Company. In connection with that purchase Nulsen, as the agent of the Pigments Company, made an agreement with DeLore that if a certain tax liability of his properties was finally determined to be less than $35,000.00 he, DeLore, would be paid one-half of the difference between the amount of the tax and $35,000.00. The amount of the tax was substantially less than $35,000.00. Nulsen refused to pay DeLore one-half of the difference and was sued therefor. That action was filed on December 29, 1926, and final judgment for DeLore was entered December 30, 1930. In the meantime, on May 14, 1923, Nulsen had sold the Pigments Company, including the DeLore Properties, to the National Lead Company. He notified the Lead Company of the DeLore claim on November 23, 1925, and formally notified the Pigments Company of that action on November 1, 1928, and requested it to defend that action. The same attorney, acting for both the Lead Company and the Pigments Company, denied any responsibility arising out of the Nulsen-DeLore transaction. The Pigments Company contended that Nulsen had not acted as its agent in the DeLore transaction. DeLore

recovered, Nulsen paid the judgment and sued the Pigments Company for the amount he was compelled to pay DeLore. The Lead Company was not joined in the latter action. Nulsen recovered in his action against the Pigments Company, and on appeal the judgment was affirmed by the Missouri Supreme Court. See Nulsen v. Pigments Company, 356 Mo. 1246, 145 S. W. (2d) 410."

Other facts in evidence, tending to defeat the Lead Company's contentions and to support those of Nulsen, are set out under findings 7 and 8 of the trial court (R. 225-228), and these are here reproduced as a summary thereof (references to pages of the record where the supporting facts appear have been added):

"7.

"The plaintiff's claim against the defendant is predicated upon the assumption that the Pigments Company's liability to DeLore was not disclosed by the audit attached to the indemnity contract of May 23, 1923, between Nulsen and the Lead Company.

"The audit contained the following references to the DeLore claim:

" 'It should be observed here that Albert G. Nulsen in these negotiations (for the purchase of the DeLore properties) acted as the Agent of the National Pigments and Chemical Company' (R. 48).

* * * * * * *

" 'The returns of the J. C. Finck Mineral Milling Company (one of the DeLore properties) for the years 1917 forward are subject to final determination by the Department; however, the reserve for possible further assessment in this respect would appear to be amply provided for' (R. 56).

" 'Reserves:

For federal income taxes of prior years of constituent companies...$27,057.92.'

(R. 57.)

* * * * * * *

" 'The balance due at December 31, 1922, on purchase money obligations, arising from the acquisition of the Finck and DeLore Companies, is made up as follows:

Payable to		
Casper P. DeLore—		
Due January 10, 1923	$50,000.00	
January 10, 1924	50,000.00	
January 10, 1925	50,000.00	$150,000.00
Albert G. Nulsen—		
Due January 10, 1923	$10,000.00	
Due January 10, 1924	10,000.00	
Due January 10, 1925	10,000.00	30,000.00
Total		$180,000.00.'

(R. 55.)

"Subsequent to the execution of the contract of May 23, 1923, the Lead Company's counsel, on September 25, 1923, made inquiry of the accountants who had made the audit attached to the contract, requesting that further information be given concerning the DeLore transaction (R. 166). Pursuant to that inquiry, in the supplemental audit furnished the Lead Company by the accountants (made for the primary purpose of determining the exact amount to be paid by the Lead Company to Nulsen), was included the following requested information concerning the DeLore transaction:

" 'In connection with the Federal income taxes of prior years of the constituent companies, we would draw your attention to the fact that the sum of $45,000.00 was originally set aside to cover the possible liability in respect of this item. The division of this amount as between the companies, and the subsequent outlays which the present company was obliged to undertake, are shown in the following summary:

	Nulsen Corporation (Old Company)		J. C. Finck Mineral Milling Company	
Original provision as of December 31, 1920.....		$10,000.00		$35,000.00
Deduct—Payments made				
On account of the year 1920	$1,680.95		$12,873.93	
On account of prior years.			205.58	
In full settlement of the years to 1919, inclusive.	3,181.62	4,862.57	.....	13,079.51
Balance, per attached Balance Sheet		5,137.43		$21,920.49

" 'The returns of the J. C. Finck Mineral Milling Company are subject to final determination by the Bureau of Internal Revenue, and while no larger assessment than the amount set up is anticipated, it should be borne in mind that one-half of any excess or insufficiency in this sum is payable to or by Mr. D. P. DeLore, as the case may be. This is in accordance with one of the provisions of the agreement, dated July 30, 1921, whereby your company acquired the Finck and DeLore properties. The taxes for all companies for the year 1920 have been duly paid on the basis of the returns as filed' (R. 135-136).

* * * * * * *

" 'Reserves:

For Federal income taxes of prior years of constituent companies...$27,057.92.'

(R. 139.)

"The above-quoted explanation of the contingent tax liability was given to the National Lead Company prior to the final settlement for the purchase of the Pigments Company, amounting to much more than the DeLore claim, was paid to Nulsen by the Lead Company (R. 116).

"8.

"The information contained in the original audit, supplemented and explained in the supplementary audit, disclosed the existence and nature of the DeLore claim and the responsibility of the Pigments Company for the payment of that claim, although at the time of

the closing of the contract for the purchase of the Pigments Company, the amount of the Finck Mineral Milling Company's tax liability to the Government had not yet been determined. Hence, at the time of the final settlement between the Lead Company and Nulsen under the contract of May 14, 1923, the possibility of the Pigments Company owing DeLore was apparent, but it had not at that time been actually determined whether DeLore owed the Pigments Company, or whether the Pigments Company owed DeLore. Likewise, for the same reasons (the non-determination of the tax liability) the amount of the obligation of the Pigments Company to DeLore had not been determined at the time of the final settlement between Nulsen and the Lead Company."

As to the facts bearing upon the defense of res judicata and estoppel by judgment, and upon the issue presented by Nulsen's counterclaim below, we reproduce here, as an accurate statement of such facts, paragraph 6 of the District Court's findings (R. 225), in which we have inserted appropriate references to the record to show the basis for the statements made:

"6.

"On October 31, 1936, the Lead Company being the owner of practically all of the capital stock of the Pigments Company caused a contract to be executed, the effect of which was to terminate the active existence of the Pigments Company and liquidate that company (R. 180, 182). The Pigments Company corporation has not been completely dissolved (R. 191), but its business affairs have been administered by the Lead Company since its purchase by the Lead Company in 1923. Since the contract of October 31, 1936, the Pigments Company has been operated by the Lead Company as a division of the Lead Company (R. 198). The same parties who are named as officers of the Pigments Company are officers of the Lead Company (R. 192-196). The Lead Company's attorney repre-

sented the Pigments Company in the trial of the action by Nulsen against the Pigments Company (R. 157-158, 197). The Lead Company conducted the defense in the action by Nulsen against the Pigments Company in April, 1937 (R. 157-158). As noted, the Lead Company had been the complete owner of the Pigments Company and all of its property since May, 1923. The Lead Company, in making the contract of indemnity with Nulsen in 1923, wrote into that contract the express provision that the indemnity should extend to the benefit of the Pigments Company (R. 43). All of these conditions existed prior to the trial of the action by Nulsen against the Pigments Company in 1937. The Lead Company in its report to the Securities Exchange Commission on July 1, 1937, listed the National Pigments Company corporation as a wholly-owned subsidiary, and that it had been liquidated on October 31, 1936" (R. 213).

It was upon the findings which we have quoted, and others, that the conclusions of the District Judge were based. These included conclusions that the action by Nulsen against the Pigments Company was in law and in fact an action between Nulsen and the Lead Company (II, R. 228); that the contract of indemnity relied upon as the basis for the Lead Company's cause of action could and should have been interposed as a defense in the former action, and the Lead Company's failure to so interpose it rendered the final judgment in the former action res judicata as to the subject matter of that defense (III, R. 229); that the rights of the parties had been finally adjudicated in the former action, reported as affirmed in 346 Mo. 1246, 145 S. W. (2d) 410, and that the indemnity agreement might not now be made the basis of a separate cause of action (IV, R. 229); that the contingent liability of the Pigments Company to DeLore was sufficiently disclosed to the Lead Company prior to its final settlement of the contract between it and Nulsen to put it on notice as to the

nature and possible extent of the DeLore claim, and hence a recovery by the Lead Company from Nulsen was not authorized upon the theory that such existence was not disclosed by the audit (V, R. 229); and that Nulsen was entitled to judgment against the Lead Company for the sum of $21,184.48, with interest at 6 per cent per annum from January 5, 1938 (VII, R. 229).

As heretofore indicated, the Circuit Court of Appeals, in reversing the District Court, ignored entirely many of the facts found by the latter, and disregarded the conclusions which had been based on those facts. Particularly was this true concerning the facts relating to the Lead Company's assumption in 1936 of its subsidiary's obligations and to its conduct of the defense of Nulsen's suit, and concerning the legal effect to be given such facts.

The Circuit Court of Appeals in its opinion, filed October 29, 1942 (R. 247), omitted any reference to various controlling decisions of the Missouri appellate courts on the questions of the effect to be given the interpretation placed by the parties on their contract, and of the effect to be given to the Lead Company's failure to assert, in the defense of Nulsen's suit against the Pigments Company, a plea that Nulsen was estopped by his contract from litigating that claim.

In the opinion it was ruled, among other things, and in effect: (1) That the facts and circumstances detailed in paragraphs 7 and 8 of the District Court's findings were not sufficient to support Nulsen's defense on the merits (R. 252), and (2) that the defense of res judicata or estoppel by judgment was not good because: (a) The issue of Nulsen's guarantee against liabilities not shown on the audit was not a point "actually litigated and determined" in his suit against the Pigments Company (R. 257); (b) the pleading of that issue by the Pigments Company in the earlier action would have been "an affirmative defense in the nature of a counterclaim or of a plea in confession and

avoidance" (R. 261), a plea inconsistent with the defendant's general denial and not good under Missouri law (R. 262); (c) there was no privity between the Lead and the Pigments Companies (R. 258); and (d) notwithstanding that the Lead Company controlled the defense of Nulsen's action against the Pigments Company, the two corporate entities could not be so disregarded as to bind the former by the judgment against the latter (R. 258-259).

On November 13, 1942, petitioner filed a petition for rehearing in the Circuit Court of Appeals (R. 265-285). In this attention was called to the several instances wherein important and undisputed facts, and controlling principles of law established by Missouri decisions, had been ignored and disregarded by the opinion. Numerous errors of omission and commission, some of the latter glaring, were urged.

The petition for rehearing was denied by the Court on November 23, 1942 (R. 287).

II.

BASIS OF THIS COURT'S JURISDICTION.

(a) This Court has jurisdiction to review the judgment of the United States Circuit Court of Appeals, under the authority of Section 240 of the Judicial Code, as amended, now being 28 U. S. C., Sec. 347.

(b) The date of the judgment of the Circuit Court of Appeals was October 29, 1942, when its opinion was entered (R. 247), and the date when such judgment became final (subject to reversal here) was November 23, 1942, when the petition for rehearing was denied (R. 287). The date of application for certiorari may be taken as the date of the filing of this petition in the office of the Clerk of this Court.

(c) The cases believed to sustain the jurisdiction of this Court are:

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922;

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

III.

THE QUESTIONS PRESENTED.

(a) Prior to the consummation of its contract with Nulsen, the Lead Company requested (R. 118, 166) and was given (R. 116, 135-136) additional information bearing upon the DeLore transaction with Nulsen as agent for the Pigments Company, and the reserves for taxes involved therein, both of which matters had been referred to in the audit attached to their contract (R. 48, 56, 57). This information disclosed that if existing tax liabilities of a constituent company should be less than the $21,920.49 reserve set up therefor in the original audit (with the stock purchased by the Lead Company increased in value to that extent), then the Lead Company would be liable to DeLore for one-half the difference, that is, it would be entitled to retain only one-half the amount of the saving in the reserve. In view of such facts, which were undisputed, may not the Lead Company be said to have recognized the contingent liability to DeLore as shown by the audit, and thereby to be precluded from asserting that it was not so shown?

(b) Being in control of the defense of Nulsen's suit against the Pigments Company (R. 157-158, 197), and having theretofore assumed that company's liabilities and caused its liquidation (R. 180, 182), was not the Lead Company bound by the judgment against its subsidiary, in whose name the suit was defended?

(c) With this litigation's history, and despite the fact that in the two actions different claims are presented (which is necessarily so), does not the principle apply that a former judgment is a bar, not only as to what was offered and received to defeat the claim therein involved, but also as to any other admissible matter which might have been offered for that purpose?

(d) By express adjudication of the Missouri Supreme Court (Nulsen v. Pigments Company, 346 Mo., l. c. 1253), the defense on behalf of the Pigments Company that Nulsen guaranteed the nonexistence of the liability there sued on was one of **estoppel by contract.** Could not such defense, consistently with a general denial of liability, have been affirmatively pleaded?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The impelling reason why this Court should provide means for reviewing the decision of the Circuit Court of Appeals is that such decision has so ruled several important questions involved in the doctrines of res judicata and of merger and estoppel by judgment as to present serious and disturbing conflicts with applicable controlling decisions of the Missouri courts. The opinion, if allowed to stand, would affect not only the rights and obligations of the parties in this private controversy, itself lacking in public or widespread interest, but it must lead to confusion, uncertainty and unsettlement in many matters of very great importance.

We draw attention specifically in this regard to:

(1) The accurate declaration that: "Parties, who having a right to do so control the litigation, are regarded as parties of record" (R. 257), followed, however, by the appli-

cation of the principle that corporate entities may be disregarded only to prevent perpetration of fraud (R. 258-259). Such principle, under the law in Missouri, as elsewhere, has no application where the matter is that of binding one who defends in the name of another;

(2) The application of the general principle that where the demands are different, in two actions, the first judgment is conclusive only of issues actually litigated (R. 257, 260), without recognizing the exception that an available defense to one action may not be later asserted as a basis for defeating a recovery on the first judgment.

(3) The holdings of the opinion (R. 260) that the Lead Company's "cause of action in the present case . . . was neither pertinent nor directly defensive to the claim made by Nulsen in the former case," and that (R. 261) "the plea (of Nulsen's guarantee contract) would have been an affirmative defense in the nature of a counterclaim or of a plea in confession and avoidance," these in the face of the Missouri Supreme Court's declaration of the law that such plea would have been one of estoppel by contract (Nulsen v. Pigments Company, 346 Mo., l. c. 1253).

In addition to the matter of the several conflicts with Missouri decisions, the opinion of the Court of Appeals presents in the particulars mentioned departures from firmly established doctrines approved and followed by this Court, by other Circuit Courts of Appeal, and previously by the Eighth Circuit Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case

numbered and entitled on its docket "No. 12,303, National Lead Company, a corporation, appellant, vs. A. G. Nulsen, Executor of the Estate of A. G. Nulsen, deceased, appellee," and that the said judgment of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

A. G. NULSEN, JR.,
Executor of the Estate of A. G. Nulsen, deceased,

By RICHARD S. BULL,
Counsel for Petitioner.

Of Counsel:

EMMET T. CARTER,
ORLA M. HILL.

BRIEF IN SUPPORT OF PETITION.

I.

OPINION OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 131 Fed. (2d) 51, and appears in the record beginning at page 247. The findings of fact and conclusions of law of the District Court appear in the record beginning at page 222.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court are invoked appears in the petition, and is therefore not repeated here.

III.

STATEMENT OF THE CASE.

A statement containing all that is deemed material to the questions presented appears in the petition under the heading, "Statement of the Matter Involved," to which reference is hereby made.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in each of the following respects:

(a) In failing to defer to and follow the conclusion of the District Court (V, R. 229) that the contingent liability of the Pigments Company to DeLore was sufficiently disclosed so as to prevent a recovery by the Lead Company against Nulsen on his agreement, and in holding, contrary

to Missouri decisions, that the Lead Company could not be bound by the fact that it treated such liability as shown (R. 255).

(b) In holding, contrary to Missouri law, that principles relative to the disregarding of corporate entities prevented application of the rule that a person, not a party of record to a suit, is nevertheless bound by a judgment therein if he has a direct interest and has the right and opportunity to make defense or control the proceeding (R. 257-259).

(c) In failing to hold, in accord with Missouri decisions, that where a defense might have been asserted, a defendant is concluded by an adverse judgment the same as if it had been pleaded.

(d) In holding (R. 260-261) that in the suit against the Pigments Company the defense of Nulsen's guarantee would not have been pertinent or directly defensive, and that it would have been in the nature of a counterclaim or a plea in confession and avoidance, inconsistent with a general denial, this being squarely in conflict with the law as declared by the Supreme Court of Missouri.

V.

ARGUMENT.

A.

The contingent liability of the Pigments Company to DeLore was recognized by the Lead Company to have been shown on the audit attached to its contract of May 23, 1923, with Nulsen, and its existence was in fact disclosed thereby. In such situation the Lead Company should not be permitted to sue Nulsen on the theory that such liability was not so shown.

State v. Trimble, 301 Mo. 146, 256 S. W. 171, l. c. 173;
Missouri Service Co. v. City of Stanberry, 341 Mo. 500, 108 S. W. (2d), l. c. 30;
St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121, l. c. 128;
Haseltine v. Farmers Mutual Ins. Co. (Mo. Sup. 1924), 263 S. W. 810;
McFarland v. Gillioz, 37 S. W. (2d) 911, l. c. 916, 327 Mo. 690;
Thomas v. Utilities Bldg. Corp., 335 Mo. 900, 74 S. W. (2d) 578, l. c. 582.

Under the heading, "The Questions Presented," III (a) of the petition preceding, we set forth briefly the basis for this portion of the argument. An elaboration appears under section I of Appellee's Petition for Rehearing (R. 265-267) and, to avoid repetition, we respectfully refer this Court thereto.

Of the Missouri authorities applicable to the question, and cited above, attention is drawn specifically to State v. Trimble and Missouri Service Co. v. City of Stanberry. The first of these holds (256 S. W., l. c. 173) that "outside evidence may be admitted to reach what the parties intended," when a contract by its terms is subject to dif-

ferent meanings, concerning which reasonable minds may reach opposite conclusions. In the latter case it was said (108 S. W. [2d], l. c. 30):

> "It is an axiom of interpretation that 'the construction which the parties place upon language is the criterion of its meaning.'"

St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121, l. c. 128, is authority for the holding that the question whether parties to a contract, by their conduct "had clearly shown their intention and meaning, as embodied in its language," is "a question of fact, and not of law."

Here the District Court was the trier of the issues of fact. It found them, in this regard, adversely to the Lead Company's contention (R. 228), and with its findings amply supported, the Circuit Court of Appeals was in error in disturbing them.

B.

The Lead Company had not only a right, which it exercised, but also an obligation, to control and participate in the defense of the suit brought by Nulsen against the Pigments Company. In such situation the Lead Company is as bound by the adverse judgment as its subsidiary, in whose name it defended the case.

State v. Stone, 269 Mo. 334, 190 S. W. 601, l. c. 603;
Owen v. Gilchrist, 304 Mo. 330, 263 S. W. 423, l. c. 430;
Womach v. St. Joseph, 201 Mo. 467, 478;
State ex rel. National Subway Co. v. St. Louis, 145 Mo. 551, 567;
Wood v. Ensel, 63 Mo. 193, 194;
Strong v. Phoenix Ins. Co., 62 Mo. 289, 295;
30 Am. Jur. 960-961, Judgments, Sec. 227;
Hart Steel Co. v. Railroad Supply Co., 244 U. S. 294, 61 L. Ed. 1148;
United States Envelope Co. v. Transco Paper Co., 221 Fed. 79;

David Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980;
Carson Investment Co. v. Anaconda Copper Mining Co., 26 Fed. (2d) 651, l. c. 657;
Hy-Lo Unit & Metal Prdts. Co. v. Remote Control Mfg. Co., 83 Fed. (2d) 345;
National Nut Co. v. Sontag Chain Stores Co., 107 Fed. (2d) 318, l. c. 322.

The opinion of the court below neither mentions, nor, apparently, gives any effect whatever to the fact that on October 31, 1936, while Nulsen's suit against the Pigments Company was pending and about six months before the trial thereof, the appellant took over the assets of the Chemical Company and assumed its "debts, liabilities and obligations" (R. 180, 182). Appellant's report to the Securities Exchange Commission showing the liquidation of its wholly-owned subsidiary as of that date (R. 211-214) also went unnoticed.

These facts in part served as a basis for paragraphs 3 and 6 of the trial court's findings of fact (R. 223-225), and for paragraphs II, III and IV of its conclusions of law (R. 228, 229). If proper consideration be given to those facts and to their legal effect, the errors of the present opinion in its application of Missouri law, on questions of privity, of estoppel by judgment, and of the doctrine of res judicata, will be patent.

The dates involved in the litigation here were: Nulsen commenced his suit against the Pigments Company on August 19, 1931 (R. 76); on October 31, 1936, the Lead Company took over the assets and assumed the obligations of the Pigments Company, and liquidated it (R. 180, 182, 211-213); and thereafter the Lead Company conducted the defense in the suit against the Pigments Company (R. 225, Findings, par. 6, and facts referred to therein).

In this connection, and with reference to the mention in the opinion that Nulsen elected to sue the subsidiary

without joining the Lead Company (R. 251, 259), it may also be pointed out that there is no evidence whatever that Nulsen had any knowledge of the contracts of October 31, 1936, between the companies at any time during the pendency of his suit against the Pigments Company. The evidence with respect thereto was first developed at the trial of the instant proceeding.

But whatever may be the law bearing on the question of privity, the circumstances here eliminate the necessity of its further consideration. Those circumstances, overlooked by the court below, bind the Lead Company as a party to the former proceeding, under Missouri law. In **Womach v. St. Joseph**, supra, cited several times in the opinion, the following "oft-quoted passage" from 1 Greenl. on Ev. (16 Ed.), Sec. 523, appears (201 Mo. 478):

> "Under the term **parties**, in this connection, the law includes all who are directly interested in the subject matter, and had a right to make a defense, or to control the proceedings, and to appeal from the judgment."

That other Missouri decisions are in accord is to be concluded from the following quotation appearing in the opinion in **State v. Stone**, 269 Mo. 334, 190 S. W. 601, l. c. 603:

> "Whenever a party is interested in the subject matter of pending litigation, and is placed in the control and management of the defense therein, he is just as much bound by the judgment in the cause as the real defendant, in whose name the defense is made."

Also in **Owen v. Gilchrist**, 304 Mo. 330, 263 S. W. 423, l. c. 430, it was said:

> "The general rule seems to be that a person not made a party of record to the suit is nevertheless bound by any judgment rendered therein if he has a direct interest in the subject matter of the suit and

has the right and opportunity to make defense or control the proceeding."

The following, from 30 Am. Jur. 960-961, Judgments, Sec. 227, also sustains our contention in this regard:

> "The strict rule that a judgment is operative under the doctrine of res judicata, only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties. Under this rule, a concealment of his interest by one who defends an action in the name of another is not regarded as sufficient to avoid the rule of res judicata."

For other Missouri cases, see, also, **State ex rel. National Subway Co. v. St. Louis**, 145 Mo. 551, l. c. 567; **Wood v. Ensel**, 63 Mo. 193, 194; **Strong v. Phoenix Ins. Co.**, 62 Mo. 289, 295. In the last case cited it was said, following a statement similar to those above:

> "The rule may be succinctly stated thus: Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it. This is the doctrine deduced from the whole current of authorities on this subject."

The decisions of this Court in **Hart Steel Co. v. Railroad Supply Co.**, 244 U. S. 294, 61 L. Ed. 1148, and of federal courts generally (see those cited at the beginning of this section), announce the same principle.

It is submitted that the Court erred in applying the rule that the corporate entities could not be disregarded, and we urge that such ruling squarely conflicts with the applicable law to which we have referred.

C.

Where the basis of a cause of action asserted by a plaintiff, to defeat the effect of a previous adverse judgment, might have been asserted as a defense in the former action, the doctrine of res judicata or merger and estoppel by judgment applies. The applicable rule in such a case, both in Missouri and generally, is that the failure to make the defense is as conclusive upon the plaintiff in the second action as if made and adjudicated.

These propositions are fully supported by the following Missouri decisions, not one of which is considered nor even mentioned in the opinion below:

Lyman v. Harvester Co., 68 Mo. App. 637;
Norman's Land & Mfg. Co. v. Idalia R. & D. Co., 226 S. W. 43, 205 Mo. App. 474;
Williams v. City of Hayti (Mo. App.), 184 S. W. 470, l. c. 473;
Marston v. Catterlin, 290 Mo. 185, 234 S. W. 816;
Greenabaum v. Elliott, 60 Mo. 25, l. c. 31;
Nelson v. Nelson, 221 S. W. 1066, 282 Mo. 412;
Donnell v. Wright, 147 Mo. 639, l. c. 646-647;
Emmert v. Aldridge, 231 Mo. 124, l. c. 129;
Rhodus v. Geatly, 347 Mo. 397, 409-410;
U. S. v. Lufcy, 49 S. W. (2d) 8, 329 Mo. 1224.

Also by the following decisions of this Court:

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195;
Dowell v. Applegate, 152 U. S. 327, 38 L. Ed. 463;
New York Life Ins. Co. v. Bangs, 103 U. S. 780, 26 L. Ed. 608;

Gila Bead Reservoir Co. v. Gila Water Co., 205 U. S. 279, 51 L. Ed. 801;
Chico County Drainage District v. Baxter State Bank, 308 U. S. 371, 84 L. Ed. 329.

Also by decisions of Circuit Courts of Appeal, following:

Linton v. Omaha Wholesale Produce Market House Co. (8th Circ.), 218 F. 331;
Guettel v. United States (8th Circ.), 95 F. (2d) 229, cert. denied 305 U. S. 603;
Engebretson v. West (8th Circ.), 111 F. (2d) 528;
Warburton v. Trust Co. (3rd Circ.), 182 F. 769.

The Circuit Court of Appeals' opinion ignores the doctrine we have set out above and the Missouri decisions which declare it. The Court, on the other hand, leans for support upon the **general** rule, also announced by Missouri decisions, that (R. 257):

> "* * * where the demands are different, . . . a former judgment is not conclusive in a subsequent action of any fact not distinctly put in issue, litigated, and directly determined in the former action. The estoppel in such a case cannot 'extend beyond the point actually litigated and determined.'"

A similar statement is made subsequently in the opinion (R. 259-260).

What the Court has overlooked is that this general rule is not so applied as to permit a defendant in one action, who has suffered judgment there, to bring forward as plaintiff, and, as the basis for another cause of action, a contention which might have been asserted as a defense in the first.

It must be recognized that in such a case as this the "demand" or "cause of action" sought to be asserted by a defendant on becoming a plaintiff could never be the **same** demand or cause of action upon which he was first

sued. Yet the Court has in effect ruled here that, because they are not the same, a defendant may never be precluded from withholding a defense and later using it as a basis for relitigating a liability.

We shall first examine here some of the decisions of this Court, to show the validity of our distinction, then those of the Eighth Circuit and Missouri courts.

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, rightly regarded as a leading case, was **not** one involving a defendant, turned plaintiff, seeking to assert a contention which in the earlier action he might have asserted as a defense. It is therefore not controlling of the instant case. (The same is true of the several Missouri decisions cited in the opinion as sustaining the rule there announced.) But the Cromwell case, by way of *obiter*, speaks of the conclusiveness of a judgment rendered on a promissory note, as against the subsequent assertion of such perfect defenses as forgery, want of consideration or payment, even though these were not brought into issue by appropriate pleading and proof. Justice Field wrote (24 L. Ed. 197-198):

> "If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

Also in the Cromwell case there is quoted with approval the decision in Henderson v. Henderson, 3 Hare 100. In that case A, and others, were required to render an account of an estate and certain transactions. A subsequently sought, in a separate action, instituted by himself, to assert claims against the estate. In such situation, as quoted by this Court (24 L. Ed. 199-200):

> "The plea of res judicata applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every point which properly belonged **to the subject of litigation,** and which the parties, exercising reasonable diligence, might have brought forward at the time." (Our emphasis.)

If clarification be needed, it is found in an abundance of later decisions, both federal and state.

In **Dowell v. Applegate,** 152 U. S. 327, 38 L. Ed. 463, plaintiff Applegate claimed title to a forty-acre tract of land and sued to remove a cloud created by a deed to defendant decreed to him in an earlier proceeding in which plaintiff had been a party defendant. The Court, speaking of this defendant in the earlier proceedings, said (38 L. Ed., l. c. 465):

> "He made no reference in his answer to, and, so far as the record before us discloses, did not introduce in evidence, the deed for the forty acres made to him October 8, 1874, by William H. H. Applegate, **although that deed is made by his bill in the present action the foundation of his claim to that tract."** (Our emphasis.)

After reviewing the proceedings in the first suit and the decree therein, the Court discussed the controlling precedents and ruled thus:

> "* * * Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to Dowell's demands—which description included the 40 acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue retried in an independent suit based solely upon a title that

he was at liberty to set up, but chose not to assert, before the decree was rendered.

"The argument to the contrary seems to rest principally if not altogether, **upon the ground that the present suit is upon a cause of action entirely different from that presented in the suit in the Federal court. In that view, our attention is called to the case of Cromwell v. Sac County,** 94 U. S. 351; Russell v. Place, 94 U. S. 608, and Bissell v. Spring Valley Twp., 124 U. S. 231."

"* * * So far from the above cases sustaining the decision of the Supreme Court of Oregon, they support the views we have expressed. The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the controversy that arose, and was determined in the suit in the Federal court as to the right of Dowell to have all the lands described in his bill subjected to his claims. **While the position of the parties is reversed, Daniel W. Applegate,** who contested that right, in the suit in the Federal court—so far as that suit related to the lands then claimed by him, including the 40 acres here in dispute—**seeks, under the guise of a new suit, to obtain a re-examination of that question.** And he seeks such re-examination, not upon any ground of fraud in obtaining that decree, but in the light simply of the conveyance of October 8, 1874, from W. H. H. Applegate, which conveyance, although existing before Dowell commenced his suit, indeed, before Dowell acquired any judgment lien of record, **he deliberately refrained from bringing to the attention of the Federal court, in some appropriate form, in support of his defense. The presenting in this suit of the fact of that conveyance,** for the purpose of showing that the 40 acres in question should not have been subjected to sale for Dowell's demands, **does not, within the rule announced in the case above cited, make a different claim or demand.** On the contrary, the matter now presented was embraced by the issues in the suit in the Federal court, and was then determined, when that court, upon final hearing, adjudged

that the 121.55 acres (which embraced the 40 acres now in dispute) should be sold to pay Dowell's claims. The case consequently comes within the rule that 'a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented.'" (Our emphasis.)

New York Life Insurance Company v. Bangs, 103 U. S. 780, 26 L. Ed. 608, involved an attempt to cancel insurance policies for fraud in their procurement after a judgment had been recovered for their proceeds. The language of Justice Field there, citing the Cromwell case, is of particular significance (26 L. Ed., l. c. 609):

> "When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or **release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration.** A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. **The contract is merged in the judgment.** Cromwell v. Sac Co., 94 U. S. 351." (Our emphasis.)

In **Gila Bend Reservoir etc. Company v. Gila Water Company**, 205 U. S. 279, 51 L. Ed. 801, l. c. 803, it was said:

> "A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled."

Then there is the case of **Chicot County Drainage District v. Baxter State Bank**, 308 U. S. 371, 84 L. Ed. 329, decided in 1940, and which reversed the decision of the Eighth Circuit Court. Plaintiffs there sought to recover on bonds issued by defendant drainage district in which a readjustment of the indebtedness in a proceeding under

the Bankruptcy Act was set up as a defense. The constitutionality of the provisions of the act was not attacked in the first proceeding, but it was in the second. On this point it was ruled (84 L. Ed. 334-335):

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, supra; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, supra."

Similar rulings were announced by the Eighth Circuit Court in **Linton v. Omaha Wholesale Produce Market House Co.**, 218 Fed. 331, and by the Court in the Third Circuit in **Warburton v. Trust Company**, 182 Fed. 769. In both of these cases it was held that plaintiffs were barred and estopped from the assertion of causes of action where the issues presented to sustain the same might have been litigated (even though they were not) in prior actions **in which such plaintiffs had suffered judgments as defendants.**

The applicability to the situation here presented of the Linton case is found in the following, quoted from the opinion of Judge Adams (218 Fed., l. c. 335-336):

> "Contention is made that the deed of Mrs. Linton to Mr. Linton, dated May 1, 1897, conferred upon him some right in addition to or different from the right acquired by him by means of the Remnant deeds, and that the present action, in so far as Mr. Linton grounds his right upon the deed of May 1, 1897, **presents a dif-**

ferent claim or demand from that involved in the Becker suit, and that as a result the judgment in that case is not res adjudicata of his present claim. We fail to see any merit in this contention. Whether Mr. Linton acquired legal title to the premises by one deed or another is not material. . . . But let it be conceded that Mr. Linton did acquire some additional support to his pretensions by the deed of 1897; **inasmuch as that was available to him in the Becker suit as a defense to the contention of Becker, the judgment rendered in that suit is just as conclusive against the prosecution by Mr. Linton of a second action based on that deed as it would have been had that deed been actually pleaded or proved as a part of his case in the Becker suit.** The judgment in that case was a finality, not only as to what was offered and received to sustain or defeat the claim or demand therein involved, but as to any other admissible matter which might have been offered for that purpose." (Our emphasis.)

In the Warburton case is the following (182 Fed., l. c. 775):

"A party cannot split up his defenses, but must put in all that he has, or else forego them. This does not apply, of course, to an equitable defense in a federal court in an action at law, nor to an independent matter of set-off, except where there is a statute which requires it. But if a legal defense, which is available, is omitted, it cannot be asserted afterwards. In the present instance the plaintiff denied liability in the former litigation, on the ground that he had been induced to go into the enterprise by fraudulent misrepresentation. 158 Fed. 969, 86 C. C. A. 173. **But if there were other grounds by which he was equally relieved he was just as much required to put them in, as he was to put in that one. He could not choose on which one of them he would defend and reserve the others, and it does not matter, therefore, whether or not any issue was made on them.**" (Our emphasis.)

That this is the law in Missouri is clearly established by the decisions of the courts of that state cited above. In the **Greenabaum** case the Court said, denying a plaintiff the right to recover money paid defendant on a former judgment obtained by the latter (60 Mo., l. c. 31):

> "Where a defendant has been legally in court, and fails or neglects to make his defense if he has one, the judgment will be conclusive upon him, unless he can show some ground for equitable interference."

In the **Williams** case the following pertinent language appears (184 S. W., l. c. 473):

> "The very matter in the answer here, in this regard, could have been pleaded there, and, **whether pleaded or not**, the estoppel by judgment is complete." (Our emphasis.)

And in the **Marston** case it is similarly stated (290 Mo., l. c. 294):

> "It is a familiar doctrine that where a defense might have been pleaded, the defendant is concluded by the judgment as to that defense the same as if it had been pleaded and evidence introduced in its support."

The rule has been affirmed also in the recent case of **Rhodus v. Geatley**, 347 Mo. 397, at pages 409 and 410, thus:

> "There remains therefore only the case of Annie Kary. It is true that as to her the questions here involved were not in issue. In this state we have accepted the doctrine, however, that where certain matters could be put in issue by an answer and are not, the decision of a case against the party who might have pleaded them but did not may be taken as an adjudication of such matters in future litigation."

In **U. S. v. Lufcy**, the Missouri Supreme Court declared (49 S. W. [2d], l. c. 14):

> "It is also well settled that a former judgment is a bar, not only as to all matters which were raised, but also to all defenses which could have been raised."

In **Donnell v. Wright** the same court considered the argument that because a particular contention was not in issue in a former trial it should not be considered as adjudicated. Judge Brace aptly said, as might be said of the opinion here (147 Mo., l. c. 646):

> "The mistake consists in regarding each issue in the case, as a separate and independent cause of action."

After then giving the quotation from **Henderson v. Henderson**, *supra*, which we have set out, and referring to other decisions, the Court said (l. c. 647):

> "This is not only the English rule and the rule in this state, but generally 'the tendency of the American cases is to regard all the issues which might have been raised and litigated in any case to be as completely barred as if they had been directly adjudicated and included in the verdict' (21 American and English Encyclopaedia of Law, 216 and 217, and notes)."

Norman's Land & Manufacturing Company v. Idalia Realty and Development Company distinctly demonstrates that under Missouri law the question presented where a defendant turns plaintiff is one of merger of causes of action, rather than one of "identity of demands or causes of action," as ruled by the court below. In that case the plaintiff, who had previously been sued as defendant in ejectment, sought to recover, for money had and received, an amount which he had been required to pay on the ejectment judgment. It was contended that the amount in ques-

tion represented the rental value of houses on the land which were in still another proceeding determined to belong to the plaintiff in the last action. The issue of his ownership of the houses, by mutual mistake, so it was said, had not been presented or decided in the ejectment suit, and he contended that there was therefore no identity of issues or causes of action such as to constitute an estoppel by judgment. Ruling against this contention, the Court said (226 S. W., l. c. 45-46):

> "It is a trite doctrine that all the issues which might have been raised and litigated in any case shall be regarded as completely barred as if they had been directly adjudicated and included in the judgment. So that it is not only to the points upon which the court was actually required by the parties to form an opinion and pronounce judgment that the doctrine of res adjudicata applies, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Greenabaum v. Elliott, 60 Mo. 25; Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; Spratt v. Early, 199 Mo. 491, 97 S. W. 925. Were this not the rule, a case could be tried piecemeal, and 'we would never reach the end of a lawsuit.' McLure v. Bank, 263 Mo. 128, 172 S. W. 336. * * * We are clearly of the opinion, and so rule, that the failure to make the defense is as conclusive upon plaintiff as if made and adjudicated."

In failing to apply the foregoing principles, established as the law by Missouri courts, by this Court, and previously by the Eighth Circuit Court, we sincerely consider that the opinion here has fallen into grievous error.

D.

The guarantee by Nulsen that the Pigments Company had no liabilities except those shown by the audit was, by its express terms, made enforceable "by both the National Pigments and Chemical Company and the National Lead Company" (R. 43). If the liability for which he sued the Pigments Company was within this guarantee, then a plea of estoppel by contract could and should have been asserted as a defense. It would not have been inconsistent with a general denial.

Nulsen v. National Pigments & Chemical Co., 145 S. W. (2d) 410, 346 Mo. 1246;
31 C. J. S. 448-449;
49 C. J. 220;
Field v. National City Bank, 343 Mo. 419, 121 S. W. (2d) 769;
Sullivan v. Bank of Harrisonville (Mo. Sup.), 293 S. W. 129;
Woodson v. Williams (Mo. Sup.), 204 S. W. 183;
Excelsior Steel Furnace Co. v. Smith (Mo. App.), 17 S. W. (2d), l. c. 380;
Palais du Costume Co. v. Beach, 129 S. W. 270, 144 Mo. App. 456;
Aull v. Mo. Pac. Ry. Co., 136 Mo. App. 291, 116 S. W. 1122, 1124;
Bay v. Trusdell, 92 Mo. App. 377.

The opinion below says (R. 260):

> "The plaintiff's cause of action in the present case for breach of the contract of May 14, 1923, was neither pertinent nor directly defensive to the claim made by Nulsen in the former case."

If by "plaintiff's cause of action in the present case" is meant the **basis** of such cause of action, which it must, and that was the alleged warranty or guaranty contained in the contract, we fail to understand the statement. Nul-

sen asserted, simply, that the defendant there was liable to him on a certain obligation. Why would it not have been both pertinent and defensive for the defendant to have answered: "If such obligation otherwise exists, yet you cannot sue thereon because you expressly warranted and guaranteed that there was no such obligation, and you yourself assumed it if it does exist; **you are estopped from asserting its existence!**"?

Indeed, that precisely is the answer the defendant there attempted to make, but for the first time in the Missouri Supreme Court (346 Mo. 1246).

The opinion also says (R. 261):

> "The cause of action in the present case (meaning, we assume, paragraph 7 of the May 14, 1923, contract), if pleaded and proved by the Chemical Company in the case in the state court, would not have negatived agency. The plea would have been an affirmative defense **in the nature of a counterclaim or of a plea in confession and avoidance.**" (Our emphasis.)

And, further:

> "Moreover, even though paragraph 7 of the contract of May 14, 1923, was made for the benefit of the Chemical Company as well as for the plaintiff, this paragraph could not under Missouri law have been pleaded as a defense, **either as ground for avoidance or as a counterclaim**, in connection with a general denial in the case in the state court."

Decisions of Missouri courts are then cited, stating the rule that defenses included in an answer **and counterclaim** must be consistent with each other, and that "the test is whether the proof of one defense **necessarily disproves** the other."

The fundamental errors here in the opinion are in its holdings that the defense in question would have been

either a **plea in avoidance or a counterclaim**, and that it would **necessarily** have disproved or refuted the general denial.

These holdings are in direct conflict with the law in the case, decided by the Missouri Supreme Court. That Court held that the defense was one of **estoppel by contract**, which, if valid, should have been affirmatively pleaded. Considering the very matter here under discussion, urged as a basis for defeating Nulsen's right to recover, the state court said (Nulsen v. National Pigments & Chemical Co., 346 Mo., l. c. 1253):

> "Plaintiff was entitled to recover, unless prevented by some affirmative defense presented to and considered by the trial court.
>
> "Estoppel by the express terms of a subsequent contract entered into between plaintiff and a third party was an affirmative defense, not pleaded, and upon which no requests for findings of fact or declarations of law were made. * * * The affirmative defense of estoppel, sought to be presented in this court for the first time, may not be considered."

The defense, then, by expressly declared Missouri law, would have been that of estoppel. Specifically, it would have been that Nulsen, by his guarantee that there were no liabilities of the company other than those shown on the audit, was estopped from asserting one not so shown. Such a plea certainly is **defensive**; it as certainly is not in the nature of a counterclaim, or for recoupment (as the opinion of the court below seems to have considered it). It might be considered as in avoidance, but not as a confession and avoidance, any more than the Statute of Limitations (which was pleaded by the Pigments Company in Nulsen's suit). The defense of estoppel by contract neither affirms nor denies the plaintiff's claim or cause of action; it merely denies his right to assert it. To clarify this, we quote from 31 C. J. S. 448-449:

"The issue which a plea of estoppel presents is not to determine the truth or validity of the particular facts pleaded, but the right and power of the party to insist on them.

"A plea of estoppel is not a plea of confession and avoidance, although it has been stated that it is in the nature of such a plea. While the plea is spoken of as a plea in bar, it is not technically such, although, like a plea in bar, it denies the right of action or defense, by denying the right to assert the facts. So the rule that the pleader, if he does not demur, must either traverse or confess and avoid all of the material allegations to which he makes answer, has no application to pleadings in estoppel which are considered to be an exception to the rule."

And, in 49 C. J. 220, it is said:

"Under the rule allowing the pleading of denials and affirmative defenses where not inconsistent, . . . estoppel . . . and settlement have been held to be defenses that may be pleaded together with a denial."

In the light of the foregoing, we respectfully suggest that the discussion in the opinion below (R. 261-262), of Missouri cases dealing with the questions of the necessity of pleading matters of recoupment and of counterclaim and of the propriety of pleading inconsistent defenses, is indeed far afield.

Why, in support of its ruling, the opinion cites **Excelsior Steel Furnace Co. v. Smith** (Mo. App.), 17 S. W. (2d) 378, 380, is difficult to understand. That case is the only one of the very many cited by the appellee below (petitioner here) which the opinion notices by so much as a citation. It holds as follows:

"Respondent contends that the general denial amounted to nothing because it was coupled with a confession and avoidance. There are some early cases in this state which seem to treat pleas in avoidance as

pleas of confession by implication. **This is not the rule which now prevails in this state. Under the later decisions, it is permissible to file a plea in avoidance without confessing the allegations in the petition and in the same answer to traverse the allegations of the petition by a general denial.** It is only when the plea in avoidance is necessarily inconsistent with the general denial that the one destroys the other (citing cases).

"Argumentative denials following positive denials and asserting that, if the facts denied were true, still plaintiff could not recover for other reasons, do not destroy the effect of the specific denials nor of a general denial. Sullivan v. Bank of Harrisonville (Mo. Sup.), 293 S. W. 129." (Our emphasis.)

Also, in the recent Missouri Supreme Court case of **Field v. National City Bank of St. Louis**, 343 Mo. 419, 121 S. W. (2d) 769, is found a further answer to the conclusion of the court below in this regard. That was an action for the value of certain property claimed to have been wrongfully obtained from plaintiff by defendants. Answers were filed containing general denials, specific denials that the property in question was ever received by defendants from plaintiff, and further pleas that defendant had released any claim he might have had (l. c. 772). In this situation, and answering plaintiff's contention that "defendants waived their general denial by their subsequent plea of confession and avoidance," the Court ruled (l. c. 774-775):

"To so construe defendants' pleadings would be too technical and violate the rule stated in Sec. 801, R. S. 1929, Mo. St. Ann., Sec. 801, p. 1052 * * *. The affirmative defense of release was not a statement of new matter inconsistent with a general denial (citing authorities) * * *. Pleas that amount to both a denial and an admission of exactly the same thing are of course inconsistent and that was the situation in the cases cited by plaintiff. State ex inf. Hadley v.

Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; Cowell v. Employers' Indemnity Corp., 326 Mo. 1103, 34 S. W. (2d) 705. We hold that the special pleas here do not affect the general denial."

See, also, in this connection:

Sullivan v. Bank (Mo. Sup.), 293 S. W., l. c. 131;
Woodson v. Williams (Mo. Sup.), 204 S. W. 183, l. c. 184;
Palais du Costume Co. v. Beach, 129 S. W. 270, 144 Mo. App. 456;
Aull v. Mo. Pac. Ry. Co., 136 Mo. App. 291, 116 S. W. 1122, l. c. 1124;
Bay v. Trusdell, 92 Mo. App. 377 (holding that in an action on a note defendant may plead both *non est factum* and payment).

Petitioner urges that on this single question the Circuit Court of Appeals does treble violence to Missouri law: (1) It deals with the defense under discussion as one of recoupment or counterclaim instead of one of estoppel; (2) turning, then, with indecision, to the thought that the defense might be regarded as a plea in avoidance, it treats it as one which necessarily would have confessed, and (3) it winds up with an apparent holding that it would have been a defense inconsistent with, or "necessarily disproving," the defense asserted by way of denial.

Such an opinion, with its obviously confusing results, calls impellingly for review and correction.

CONCLUSION.

Under the doctrine, now so well established, demanding that the federal courts follow the settled rules of decision of the state courts in matters of local law, we urge that the opinion of the court below in this case has fallen into grievous error, in many particulars. With a realization

that great public questions confront our courts, we yet in sincerity believe that even now the smaller private litigations should not go unobserved and unsupervised by this Court, if in them are things that foster confusion in settled and salutary doctrines of justice. We, therefore, respectfully but earnestly declare that in the opinion here sought to be reviewed there are such things; that principles of importance are involved, and that this Court should exercise its discretionary power to review, to clarify, and to correct.

Respectfully submitted,

RICHARD S. BULL,
418 Olive Street,
St. Louis, Mo.,
Counsel for Petitioner.

Of Counsel:

EMMET T. CARTER,
St. Louis, Mo.

ORLA M. HILL,
Clayton, Mo.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

A. G. NULSEN, JR., Executor of the Estate of A. G. NULSEN, Deceased,
Petitioner
(Appellee Below),

vs.

NATIONAL LEAD COMPANY,
a Corporation,
Respondent
(Appellant Below).

No. 638

SUGGESTIONS IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

THOMAS BOND,
705 Olive Street,
St. Louis, Missouri,
Counsel for Respondent.

Of Counsel:
R. E. MOLONEY,
G. T. PRIEST,
705 Olive Street,
St. Louis, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

A. G. NULSEN, JR., Executor of the Estate of A. G. NULSEN, Deceased, Petitioner (Appellee Below),

vs.

NATIONAL LEAD COMPANY, a Corporation, Respondent (Appellant Below).

No. .....

SUGGESTIONS IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

Statement.

The litigation involved herein is an action for damages for breach of contract by the National Lead Company, respondent herein, against A. G. Nulsen, Jr., executor of the estate of A. G. Nulsen, deceased, petitioner herein.

Suit was originally filed, by respondent herein, against petitioner, herein, in the Circuit Court of the City of St.

Louis, Missouri, and removed by petitioner herein to the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Judgment in the District Court was for petitioner herein and against respondent herein.

On appeal to the Circuit Court of Appeals for the Eighth Judicial Circuit, the Court, making its own findings of fact and reaching its own conclusions thereon, reversed the District Court's judgment.

Reasons for Opposing the Granting of the Writ.

There is no federal question, constitutional or otherwise, involved.

There is no conflict of opinions, between different Circuit Courts of Appeal, involved.

There is no question of great public importance or interest, involved.

There is no jurisdictional question, involved.

There is no decision, by this Court, involving the construction of Missouri law governing Missouri contracts, or Missouri judgments, which, the Court of Appeals, in its opinion, refused to follow.

The reasons assigned for the granting of the application of the writ herein are not within Rule 38 of this Court. Ruhlin v. New York Life Ins. Co., 304 U. S. 202, l. c. 206.

It is quite evident, from the application of the writ and brief in support thereof, that petitioner is seeking by said writ to have this Court review the correctness of the conclusions reached by the Court of Appeals in its opinion, upon the facts, as found by the Court. General Picture Co. v. Electric Co., 304 U. S. 175, l. c. 178.

The Court of Appeals in its opinion correctly applied the Missouri law governing Missouri contracts and Missouri judgments.

We respectfully submit that the application for the writ herein be denied.

THOMAS BOND,
705 Olive Street,
St. Louis, Missouri,
Counsel for Respondent.

Of Counsel:

R. E. MOLONEY,
G. T. PRIEST,
705 Olive Street,
St. Louis, Missouri.